CAUSE NO. 05-18-00098-CR

IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

****

JAMES BERKELEY HARBIN II,
Appellant

v.

THE STATE OF TEXAS

****

On Appeal from the 204th District Court
Dallas County, Texas
Trial Court Cause No. F91-22107-Q

****

BRIEF OF APPELLANT

****

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IDENTITY OF PARTIES

Trial Judge: the Honorable Judge Tammy Kemp, 204th District Court

Parties:

Appellant: James Berkeley Harbin II

Appellee: The State of Texas and Dallas County, Texas

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TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW James Berkeley Harbin II, appellant herein, and respectfully submits this his brief on appeal from his conviction and sentence for the offense of Murder. Judgment was rendered in the 204th District Court , Dallas, County, Texas,

Judge Tammy Kemp presiding.

STATEMENT OF THE CASE

Appellant was convicted of the offense of Murder in 1991. Through the post conviction process he was awarded a new punishment hearing in December of 2017. Appellant elected to have punishment assessed by a jury. The jury assessed his sentence at confinement in the penitentiary for twenty-four (24) years. (RR 4: 124). Notice of appeal was timely given.

ISSUE PRESENTED

ISSUE NO. I

THE DISTRICT COURT COMMITTED ERROR IN OVERRULING APPELLANT'S OBJECTION TO THE OMISSION OF A MITIGATION INSTRUCTION

STATEMENT OF FACTS

In 1991 appellant murdered his father. (RR 3: 63). He signed a written statement admitting that he had shot his father multiple times in the back and his head. (RR 3: 57). Appellant's statement admitted that he had caused the death of his father but attempted to mitigate his actions. (RR 3: 70 - 78). At this punishment hearing appellant presented testimony from himself, family and friends as to his father's serious mental issues and his extreme violence toward him and his family.

The victim was twice hospitalized for mental illness wherein he received electro-shock treatment. (RR 3: 184). He was forced to leave his job at the post office because of medical disability. (RR 3: 106-107). He took medication for severe depression. (RR 3: 158). One daughter described his depression medication as a "sea" of prescription bottles. (RR 3: 159).

There were multiple acts of violence, or threatened violence, by the victim against appellant and family members. It was this behavior by appellant's father that led appellant to cause his father's death. In a letter appellant wrote to his sister, he

said that he killed his father because of this abusive behavior which would forever alter his life. (RR 3: 126).

In one instance, appellant's father followed appellant's mother, his ex-wife, to the local church wanting to speak to her. When he was told that she and her husband had already left he went into a rage, yelling and that it was a lie that they had left the church. (RR 3: 146). The witness to this event had not done anything to provoke him. (RR 3: 146).

Appellant's sisters testified to appellant's father being emotionally and physically abusive to him. (RR 3: 166). In one instance while the family was seated at the kitchen table, appellant's father backhanded him so hard that he flew out of his chair landing in another room. (RR 3: 156, 167). In another incident appellant's father picked him up by his throat and choked him. (RR 3: 158). There was another time when appellant's father struck him with a broom stick.

The violent behavior was also addressed to appellant's mother and new husband. Appellant's father threatened to burn their house down and appellant was aware of this threat. (RR 3: 158, 182). Appellant's father stalked appellant's mother and threatened to kill her and her new husband. (RR 3: 182). Because of the violent relationship between appellant and his father, his mother was afraid that her son would one day be killed by his father. (RR 3: 185).

Appellant testified and verified the testimony about his father's abusive and violent behavior towards him. (RR 4: 34, 35, 36). However, he went further and explained the though process that led him to murder his father.

On the night he killed his father, appellant and the victim were at a rural location discussing events about to occur in appellant's life. Appellant told his father that he was going to quit school. This enraged his father because he would no longer receive child support, which he needed, if his son left school. He accused appellant's mother of convincing him to leave school. (RR 4: 38). Appellant denied this telling his father that he had not seen his mother that day and that he had been with his girlfriend all day. His father then made a lewd comment about the sexual activity of the girlfriend and appellant's mother and sister. (RR 4: 38). This incident and the previous incidents of physical abuse, led appellant to believe that his father would never stop trying to harm him and his family. (RR 4: 40). Appellant retrieved his pistol from his car and murdered his father. (RR 4: 40).

Appellant presented the testimony of a forensic psychologist to explain, but not justify, his actions in killing his father. He testified that appellant's action in killing his father was know as "patricide." Having interviewed appellant, heard the testimony at the punishment hearing, and reviewing limited psychological records of appellant' father, he concluded that his father was severely mentally ill. (RR 3: 210). Based

upon all of the foregoing, the doctor concluded that appellant suffered from abused child syndrome. (RR 3: 211). Appellant's behavior was not an act in self-defense. (RR 3: 212). It was however what the doctor, and the literature supports, called psychological self-defense. (RR 3: 213).

According to the doctor there are three types of patricide offenders. First, the mentally disturbed offender. Second, the seriously anti-social offender, and third the abused child offender. (RR 3: 215). Appellant fit into this last category, that of the abused offender.

The abused offender feels helpless and believes that he has no other way to stop the abuse than to kill. (RR 3: 216). This type of killer feels trapped and without a method of controlling the abusive action towards the child. (RR 3: 214). This type of child abused offender kills to prevent further abuse against the child and perhaps the child's family. (RR 3: 214). As a result of the long term abuse towards the child and the child's family, the child feels helpless to change the situation and sees no other way to end the abuse. (RR 3: 214). Although appellant would no have been classified as a juvenile offender under Texas law, from the psychologist's point of view, he was a child. (RR 3: 202 - 203).

SUMMARY OF THE ARGUMENT

Appellant presented evidence at the punishment stage of the trial that he caused the death of his father because of sudden passion arising from an adequate cause. Appellant objected to the court's charge which omitted this mitigating language. Appellant suffered some harm from the erroneous instructions because he received a lengthier sentence that would have been available to the jury if the instruction had been given.

ARGUMENT

ISSUE NO. I

THE DISTRICT COURT COMMITTED ERROR IN OVERRULING APPELLANT'S OBJECTION TO THE OMISSION OF A MITIGATION INSTRUCTION

At the time of appellant's first trial in 1991, the offense of intentionally killing another was contained in two separate statutes. The offense of murder was made penal by **TEX. PENAL CODE §19.02** and was classified as a first degree felony offense. If the offender murdered the victim but did so under the immediate influence of sudden passion arising from an adequate cause, he was guilty of the offense of Voluntary Manslaughter which was classified as a second degree felony offense. See **TEX. PENAL CODE §19.04**. Voluntary manslaughter was a lesser included offense to that of murder and, if raised by the evidence, was submitted to the jury in the guilt/innocence charge.

Over the course of time, and relevant to appellant's trial in 2017, the two statutes were merged into a single statute. Whether a person committed murder

intentionally or knowingly or committed murder engendered by sudden passion arising from an adequate cause, the offense was labeled "murder." Under the current statute the issue, if raised by the evidence is submitted at the punishment phase of the trial. Murder committed intentionally and knowingly is still a first degree felony and murder committed under sudden passion arising from an adequate cause is a second degree felony.

In the instant cause appellant objected that the punishment charge did not contain the mitigating language so that the punishment range would have been for a second degree felony offense. (RR 4: 95). The objection was overruled. (RR 4: 96).

The change in the law of "sudden passion" being the result of an "adequate cause" making these issues determined at punishment rather than guilt/innocence was procedural and not substantive in nature. Laws that do not amend substantive law by defining criminal acts or providing for penalties are procedural in nature. *Ex parte Johnson*, 697 S.W.2d 605, 607 (Tex. Crim. App.1985); *Carter v. State*, 813 S.W.2d 746, 747 (Tex. App. - Houston [1st Dist.] 1991). Procedural changes are in the process by which a criminal case is adjudicated as opposed to changes in the substantive law of crimes. *Ex parte Scales*, 853 S.W.2d 586, 588 (Tex. Crim. App.1993). Procedural statutes control pending litigation from their effective date, absent an express provision to the contrary. *Ex parte Johnson*, 697 S.W.2d at 607 - 08;

Medina v. State, 828 S.W.2d 268, 272 (Tex. App. - San Antonio 1992); *Freeman v. State*, 786 S.W.2d 56, 58 (Tex. App. - Houston [1st Dist.] 1990).

If the defendant raises by the evidence that he acted from sudden passion arising from an adequate cause he is entitled to this mitigating instruction at the punishment stage of the trial. To warrant a jury instruction on the issue of sudden passion at the punishment phase, the record must at least minimally support an inference: 1) that the defendant in fact acted under the immediate influence of a passion such as terror, anger, rage, or resentment; 2) that his sudden passion was in fact induced by some provocation by the deceased or another acting with him, which provocation would commonly produce such a passion in a person of ordinary temper; 3) that he committed the murder before regaining his capacity for cool reflection; and 4) that a causal connection existed between the provocation, passion, and homicide. It does not matter that the evidence supporting the submission of a sudden passion instruction may be weak, impeached, contradicted, or unbelievable. If the evidence thus raises the issue from any source, during either phase of trial, then the defendant has satisfied his burden of production, and the trial court must submit the issue in the punishment jury charge-at least if the defendant requests it. *Beltran v. State*, 472 S.W.3d 283, 289 (Tex. Crim. App. 2015); *Wooten v. State*, 400 S.W.3d 601, 604 - 05 (Tex. Crim. App.2013). A defendant's testimony alone is sufficient to raise a defensive issue

requiring an instruction in the charge. *Shaw v. State*, 243 S.W.3d 647, 662 (Tex. Crim. App. 2007).

TEX. PENAL CODE §19.02(a)(1) defines "adequate cause" as "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." **TEX. PENAL CODE §19.02(a)(2)** defines "sudden passion" as passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation. Appellant presented evidence on both of these issues.

The adequate cause was the many years of abuse he and his family suffered at the hands of his father. His father threatened to kill his mother and her new husband. His father inflicted emotional and physical harm upon appellant. Appellant testified to the rage that happened to him when he realized that his father would not stop his abuse unless he took action that night and at that location. Appellant was entitled to mitigating instruction at punishment. The district court erred in overruling appellant's timely and specific omission of this instruction.

When jury charge error is preserved at trial, the reviewing court must reverse if the error caused some harm. *Rogers v. State*, 550 S.W.3d 190, 191 - 92 (Tex. Crim. App. 2018) *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013). "Some

harm" means actual harm and not merely a theoretical complaint. *Cornet*, 417 S.W.3d at 449; *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012). The defendant has no burden of proof associated with the harm evaluation on appeal. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). Reversal is required if the error was calculated to injure the rights of the defendant. The harm evaluation by the apellate court includes a review of the whole record, including the jury charge, contested issues, weight of the probative evidence, arguments of counsel and other relevant information. *Cornet*, 417 S.W.3d at 450. The harm evaluation is case-specific. *Cornet*, 417 S.W.3d at 451.

In the instant cause appellant received a sentence of confinement in the penitentiary for twenty-four (24) years. Had the mitigating instruction been given and accepted by the jury, the maximum sentence he could have received was for confinement in the penitentiary for twenty (20) years. Harm is apparent. The pending cause should be reversed for a new punishment hearing.

PRAYER FOR RELIEF

WHEREFORE, FOR THE FOREGOING REASONS, Appellant prays that this Honorable Court reverse and remand this conviction to the trial court for a new punishment hearing.

Respectfully submitted**,**

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CERTIFICATE OF WORD-COUNT COMPLIANCE

The undersigned attorney hereby certifies, in compliance with **TEX. R. APP. PROC. 9.4 (i) (B) (2)** that this document contains 2168 words, including all contents except for the sections of the brief permitted to be excluded by **TEX. R. APP. PROC. 9.4 (i) (1).**

/s/ Lawrence B. Mitchell
LAWRENCE B. MITCHELL

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing brief is being served on the attorney representing the State of Texas, Lori Ordiway by e-mail at lori.ordiway@dallascounty.org on this the 7th day of October, 2018.

/s/ Lawrence B. Mitchell
LAWRENCE B. MITCHELL